

BPAC

AGENDA ITEM NO. 4

PUBLIC HEARING AND  
COMMITTEE RECOMMENDATION:  
PROPOSED REGULATIONS  
GOVERNING DETERMINATION OF  
“EMPLOYEE” STATUS

Attachment A

Notice of Proposed  
Regulatory Actions



# California Regulatory Notice Register

REGISTER 2008, NO. 42-Z

PUBLISHED WEEKLY BY THE OFFICE OF ADMINISTRATIVE LAW

OCTOBER 17, 2008

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The *California Regulatory Notice Register* is an official state publication of the Office of Administrative Law containing notices of proposed regulatory actions by state regulatory agencies to adopt, amend or repeal regulations contained in the California Code of Regulations. The effective period of a notice of proposed regulatory action by a state agency in the *California Regulatory Notice Register* shall not exceed one year [Government Code § 11346.4(b)]. It is suggested, therefore, that issues of the *California Regulatory Notice Register* be retained for a minimum of 18 months.

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interest codes shall approve codes as submitted, revise the proposed code and approve it as revised, or return the proposed code for revision and re-submission.

#### REFERENCE

Government Code Sections 87300 and 87306 provide that agencies shall adopt and promulgate conflict-of-interest codes pursuant to the Political Reform Act and amend their codes when change is necessitated by changed circumstances.

#### CONTACT

Any inquiries concerning the proposed conflict-of-interest code(s) should be made to Sarah Olson, Fair Political Practices Commission, 428 J Street, Suite 620, Sacramento, California 95814, telephone (916) 322-5660.

#### AVAILABILITY OF PROPOSED CONFLICT-OF-INTEREST CODES

Copies of the proposed conflict-of-interest codes may be obtained from the Commission offices or the respective agency. Requests for copies from the Commission should be made to Sarah Olson, Fair Political Practices Commission, 428 J Street, Suite 620, Sacramento, California 95814, telephone (916) 322-5660.

### **TITLE 2. PUBLIC EMPLOYEES' RETIREMENT SYSTEM**

#### **NOTICE OF PROPOSED REGULATORY ACTION**

NOTICE IS HEREBY GIVEN that the Board of Administration (Board) of the California Public Employees' Retirement System (CalPERS) proposes to take the regulatory action described below in the Informative Digest after considering public comments, objections, or recommendations.

#### **I. PROPOSED REGULATORY ACTION**

In this filing, the Board proposes to add Article 6.5 entitled "Membership" in Title 2 of the California Code of Regulations. Sections 578 and 578.1 would be added to Article 6.5. The proposed regulatory action interprets Government Code sections 20125 and 20028 and makes specific the criteria to be used when determining

whether an individual qualifies as an employee for CalPERS retirement purposes.

#### **II. WRITTEN COMMENT PERIOD**

Any person interested may submit written comments relevant to the proposed regulatory action. The written comment period closes at 5:00 p.m. on **December 1, 2008**. The Regulations Coordinator must receive all written comments by the close of the comment period. Comments may be submitted via fax at (916) 795-4607; e-mail at: [joe\\_parilo@calpers.ca.gov](mailto:joe_parilo@calpers.ca.gov); or mailed to the following address:

Joe Parilo, Acting Regulations Coordinator  
California Public Employees' Retirement System  
P.O. Box 942702  
Sacramento, California 94229-2702  
Telephone: (916) 795-3484

#### **III. PUBLIC HEARING**

Comments on the proposed action will also be taken at a public hearing to be placed on the agenda of the regularly scheduled meeting of the CalPERS Benefits and Program Administration Committee of the CalPERS Board:

**December 17, 2008**  
**9:00 a.m.**  
California Public Employees' Retirement System  
Lincoln Plaza North, Auditorium  
400 P Street  
Sacramento, California 95814

#### **IV. ACCESS TO HEARING ROOM**

The hearing room will be accessible to persons with mobility impairments, and can be made accessible to persons with hearing or vision impairments upon advance request to the Regulations Coordinator.

#### **V. AUTHORITY AND REFERENCE**

The CalPERS Board of Administration has general authority to take regulatory action under Government Code section 20121. Under Government Code section 20125, the Board has the specific authority to adopt proposed sections 578 and 578.1. This action would interpret Government Code sections 20125 and 20028 and make specific the criteria used when determining employee status for CalPERS retirement purposes.

## VI. INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

Government Code section 20125 authorizes the Board to “determine who are employees and is the sole judge of the conditions under which persons may be admitted to and continue to receive benefits under this system.” Government Code section 20028 generally defines an “employee” as “any person in the employ of the state, a school employer or a contracting agency.

Proposed section 578 limits the scope of these regulations to interpreting the California Public Employees’ Retirement Law, Government Code sections 20000–21765, and to employee determinations for retirement purposes.

The determination of employee status is crucial because a) retirement benefits by law may only be provided to designated employees, and b) in order to preserve the federal tax-qualified status of the system, CalPERS must ensure it provides retirement benefits only to the common law employees of the state, school employers and contracting agencies.

Proposed section 578.1 would codify CalPERS’ longstanding practice of utilizing common law requirements to determine employee status and would make specific that the common law employment factors, as discussed in California case law and in a Precedential Decision by the CalPERS Board, are the criteria used to determine employee status under Government Code sections 20125 and 20028 for all individuals providing services to the state, school employers and contracting agencies.

The California Supreme Court, in 2004, confirmed that the common law employment test was the test to be used to determine if individuals were employees of the Metropolitan Water District (a CalPERS contracting agency) for the purposes of CalPERS eligibility. (*Metropolitan Water District of Southern California v. Superior Court* (2004) 32 Cal 4th 491; often referred to as the “Cargill” decision.)

After the *Cargill* decision, the CalPERS Board adopted as precedential its decision entitled *In the Matter of the Application for CalPERS Membership Credit by Lee Neidengard v. Tri-Counties Association for the Developmentally Disabled* (Case No. 05-01), a case which determined whether Lee Neidengard served as an employee or independent contractor when performing service for Tri-Counties Association. In this Precedential Decision, the Board cited the case of *Tieberg v. Unemployment Ins. App. Bd.* (1970) 2 Cal.3d 943, which articulated the common law factors for making such a determination. Citing to *Cargill*, the Board also concluded in *Neidengard* that since the Public Employees’ Retirement Law does not define “independent

contractor” or “employee” of a contracting agency with greater particularity, these terms must be defined with reference to the California common law.

The proposed regulations incorporate the factors referred to in the *Tieberg*, *Cargill* and *Neidengard* decisions as the factors to be used to interpret sections 20125 and 20028 and make specific the criteria used to determine employee status for CalPERS retirement purposes.

## VII. EFFECT ON SMALL BUSINESS

The proposed regulatory action does not affect small business because it applies only to public employees working in positions qualified for membership in CalPERS.

## VIII. DISCLOSURES REGARDING THE PROPOSED REGULATORY ACTION

- A. MANDATE ON LOCAL AGENCIES AND SCHOOL DISTRICTS: The proposed regulatory action does not impose a mandate on local agencies or school districts.
- B. COST OR SAVINGS TO ANY STATE AGENCY: The proposed regulatory action may achieve a cost savings for CalPERS, resulting from decreased litigation and administrative appeals as employers and individuals become more aware of the criteria used to determine employee status for CalPERS retirement purposes.
- C. COST TO ANY LOCAL AGENCY OR SCHOOL DISTRICT: The proposed regulatory action does not impact costs or savings for any local agency or school district, such that costs would qualify for reimbursement under Government Code section 17500, et seq.
- D. NONDISCRETIONARY COSTS OR SAVINGS IMPOSED ON LOCAL AGENCIES: The proposed regulatory action does not impose non-discretionary costs or savings on local agencies.
- E. COSTS OR SAVINGS IN FEDERAL FUNDING TO THE STATE: The proposed regulatory action does not impact any federal funding to the state.
- F. ADVERSE ECONOMIC IMPACT: The proposed regulatory action has no significant statewide adverse economic impact directly affecting businesses, including the ability of business in California to compete with business in other states.

G. **COST IMPACT ON REPRESENTATIVE PRIVATE PERSONS OR BUSINESSES:** CalPERS is not aware of any cost impacts that representative private persons or businesses would necessarily incur in reasonable compliance with the proposed action.

H. **IMPACT ON JOBS AND BUSINESSES WITHIN CALIFORNIA:** The proposed regulatory action will not: (1) create or eliminate jobs within California; (2) create new businesses or eliminate existing businesses within California; or (3) affect the expansion of businesses currently doing business within California.

I. **EFFECT ON HOUSING COSTS:** The proposed regulatory action has no effect on housing costs.

#### IX. CONSIDERATION OF ALTERNATIVES

The Board must determine that no reasonable alternative considered by the Board or that has otherwise been identified and brought to the attention of the Board would be more effective in carrying out the purpose for which the action is proposed, or would be as effective as and less burdensome to affected private persons than the proposed action. The alternative of adopting no regulation would be less effective and would not lead to the anticipated benefits expected from the proposed action.

The Board invites interested persons to present statements or arguments with respect to alternatives to the proposed regulation at the above mentioned hearing or during the written comment period.

#### X. CONTACT PERSONS

Please direct inquiries concerning the substance of the proposed regulatory action to:

Steve Propp  
Employer Services Division  
California Public Employees' Retirement System  
P.O. Box 942709  
Sacramento, California 94229-2709  
Telephone: (916) 341-2473  
Fax: (916) 341-2744  
E-mail: [steven\\_propp@calpers.ca.gov](mailto:steven_propp@calpers.ca.gov)

Please direct requests concerning processing of this regulatory action to Joe Perilo, Acting Regulations Coordinator, at the address shown above, or (916) 795-3484 ([joe\\_perilo@calpers.ca.gov](mailto:joe_perilo@calpers.ca.gov)).

#### XI. AVAILABILITY OF STATEMENT OF REASONS AND TEXT OF PROPOSED REGULATIONS

The entire rulemaking file is available for public inspection through the Acting Regulations Coordinator at the address shown above. To date the file consists of this notice, the proposed text of the regulations, and the Initial Statement of Reasons (ISOR). A copy of the proposed text and the ISOR is available at no charge upon telephone or written request to the Acting Regulations Coordinator.

The Final Statement of Reasons can be obtained, once it has been prepared, by written request to Joe Perilo, Acting Regulations Coordinator, at the address shown in Section II.

#### XII. AVAILABILITY OF MODIFICATIONS TO PROPOSED AMENDMENT

The Board may, on its own motion or at the recommendation of any interested person, modify the proposed regulations after the public comment period has closed. It may amend the proposed regulations as modified, if the changes are sufficiently related to the original text so the public could have anticipated them.

If the Board modifies its regulatory action in this manner, it will prepare a comparison of the original proposed text and the modifications for an additional public comment period of not less than 15 days prior to the date on which the Board adopts, amends or repeals the resulting regulation. A copy of the modified text will be mailed to all persons who submitted written comments, who testified or submitted written comments at the public hearing, or asked to be kept informed as to the outcome of this regulatory action.

#### XIII.

One can access the regulatory material regarding this action at CalPERS' website at [www.calpers.ca.gov](http://www.calpers.ca.gov) under *About CalPERS > Legislation, Regulations & Statutes > Regulatory Actions > Current Regulatory Actions*.

#### TITLE 3. DEPARTMENT OF FOOD AND AGRICULTURE

NOTICE IS HEREBY GIVEN that the Department of Food and Agriculture amended Section 3434, subsections (b) of the regulations in Title 3 of the California Code of Regulations pertaining to Light Brown Apple Moth Interior Quarantine as an emergency action that was effective on June 11, 2008. The Department proposes to continue the regulation as amended and to

## **Title 2. California Public Employees' Retirement System**

### **NOTICE OF PROPOSED REGULATORY ACTION**

#### **Add Article 6.5. MEMBERSHIP**

#### **Sections 578 and 578.1 to**

#### **Title 2 of the California Code of Regulations**

### **ARTICLE 6.5. MEMBERSHIP**

#### **§ 578. Scope and Authority.**

These regulations interpret the California Public Employees' Retirement Law, Government Code sections 20000 - 21765, by making specific the criteria for employee determinations.

#### **§ 578.1. Determination of "Employee" Status.**

(a) For the purposes of the California Public Employees' Retirement Law, and for retirement programs administered by the Board of Administration, CalPERS shall utilize the California common law employment test as set forth in subdivisions (b) and (c), below, to determine whether an individual is "in the employ of" an entity as that phrase is used in Government Code section 20028.

(b) The most important factor in determining employee status is the right of the entity seeking to have the services performed to control the manner and means of accomplishing the result desired, regardless of whether that right is exercised with respect to all details.

(c) The other factors to be taken into consideration are:

- (1) Whether or not the individual performing the services is engaged in a distinct occupation or business.
- (2) The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the entity seeking to have the services performed without supervision.
- (3) The skill required in the particular occupation.
- (4) Whether the entity seeking to have the services performed, or the individual performing the services, supplies the instrumentalities, tools and the place of work for individual performing the services.
- (5) The length of time for which the services are performed.
- (6) The method of payment, whether by the time or by the job.
- (7) Whether or not the work is part of the regular business of the entity seeking to have the services performed.

## **Title 2. California Public Employees' Retirement System**

### **NOTICE OF PROPOSED REGULATORY ACTION**

- (8) Whether or not the parties believe they are creating the relationship of employer and employee.
- (d) If the California Public Employees' Retirement System determines, based on the factors listed in subdivisions (b) and (c), above, that the individual does not have employee status, then the individual is not eligible for membership in the California Public Employees' Retirement System for those services.

NOTE: Authority cited: Sections 20120, 20121 and 20125, Government Code.

Reference: Sections 20028; 20030, 20069; 20125; 20281; 20283; 20284; 20300, subdivision (b); 20370; 20460; 20502; Government Code; *Metropolitan Water District of Southern California v. The Superior Court of Los Angeles County (Cargill)* (2004) 32 Cal.4th 491; *Tieberg v. Unemployment Ins. App. Bd.* (1970) 2 Cal.3d 943; and *In the Matter of the Application for CalPERS Membership Credit by Lee Niedengard and Tri-Counties Association for the Developmentally Disabled* (CalPERS Precedential Decision No. 05-01, effective April 22, 2005.)



## **INITIAL STATEMENT OF REASONS**

### **Adoption of new sections 578 and 578.1 - Determination of "Employee" Status**

#### **Description of Public Problem, Administrative Requirement, or Other condition or Circumstance that the Regulation is Intended to Address:**

CalPERS is often called upon to determine whether an individual is an employee of a CalPERS-covered agency who may be eligible for CalPERS' membership for retirement benefits. A determination of employee status is crucial because a) retirement benefits by law may only be provided to designated employees, and b) in order to preserve the federal tax-qualified status of the system, CalPERS must ensure it provides retirement benefits only to the common law employees of the state, school employers and contracting agencies. Under Internal Revenue Code section 401(a), a requirement for pension plan qualification (and exemption from federal taxation) is that the plan of an employer must be for the "exclusive benefit" of the employer's employees and their beneficiaries.

The CalPERS Board of Administration (Board) has specific authority under Government Code section 20125 to "determine who are employees and is the sole judge of the conditions under which persons may be admitted to and continue to receive benefits under this system." Government Code section 20028 generally defines "employee" as "any person in the employ of" the state, a school employer or a contracting agency. Because the definition of "employee" is general, CalPERS has historically looked to the common law to determine employee status for CalPERS retirement purposes.

In recent years, a California Supreme Court decision and a CalPERS Board Precedential Decision have confirmed that the common law employment factors should be used when determining whether an individual is an employee of a CalPERS contracting agency and is eligible for CalPERS retirement benefits. The proposed regulations incorporate the common law factors into any employee determination performed regardless of whether the individual performs services for the state, school employers or contracting agencies.

**Specific Purpose:** To codify the common law employment factors into the interpretation of Government Code sections 20125 and 20028 and to make specific the criteria used to determine whether an individual is the employee of a CalPERS-covered employer.

**Necessity:** To preserve the tax-qualified status of the retirement system, CalPERS must ensure it determines employee status utilizing the common law employment test when determining whether individuals providing services to the state, school employers and contracting agencies are eligible for CalPERS' membership.

The proposed regulations are intended to incorporate the common law factors, as discussed in California case law, to determine employee status under

Government Code sections 20125 and 20028. CalPERS long-standing practice has been to utilize common law requirements to determine employee status. Over the years, there have been a number of questions and various challenges relating to whether CalPERS should use the common law employment test to determine employee status. In 2004, the California Supreme Court confirmed that the common law factors were to be used to determine if individuals were employees of the Metropolitan Water District (a CalPERS employer) for the purposes of CalPERS' eligibility. (*Metropolitan Water District v. Superior Court* (2004) 32 Cal. 4th 491; often referred to as the "Cargill" decision.)

After the *Cargill* decision, the CalPERS Board of Administration adopted as precedential its decision entitled *In the Matter of the Application for CalPERS Membership Credit by Lee Neidengard v. Tri-Counties Association for the Developmentally Disabled* (Case No. 05-01), a case which determined whether Lee Neidengard served as an employee or independent contractor when performing service for Tri-Counties Association. In this precedential decision, the Board cited the case of *Tieberg v. Unemployment Ins. App. Bd.* (1970; 2 Cal.3d 943), which articulated the common law factors for making such a determination. Citing to *Cargill*, the Board also concluded in *Neidengard* that since the Public Employees' Retirement Law does not define "independent contractor" or "employee" of a contracting agency with greater particularity, these terms must be defined with reference to the common law factors.

The proposed regulations incorporate the factors discussed in the *Tieberg*, *Cargill* and *Neidengard* decisions to interpret sections 20125 and 20028 and to make specific the criteria used to determine employee status for CalPERS retirement purposes. The adoption of these regulations will benefit the public, CalPERS' employers and members and assist CalPERS' staff by setting forth the factors to be considered when determining if individuals are employees of the state, school employers and contracting agencies and by reducing administrative appeals and litigation over the question of who is an employee.

Technical, Theoretical and/or Empirical Studies, Reports or Documents: Not applicable.

Alternatives to the Regulatory Action and CalPERS' Reasons for Rejecting Those Alternatives: CalPERS has considered alternatives to this proposal, and has determined that there is no more effective way to carry out its purpose that would be less burdensome. The alternative of adopting no regulation would be less effective and would not lead to the anticipated benefits expected from the proposed action.

Alternatives to the Regulatory Action that Would Lessen any Adverse Impact on Small Businesses: The proposed action has no cost impact on small businesses because it applies only to public agency employee retirement benefits.